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FOR ARGUMENT

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978
No. 78-1577

SEARS, ROEBUCK & CO., a corporation,

Petitioner,

vs.

COUNTY OF LOS ANGELES and
CITY OF COMPTON,

Respondents.

RESPONDENTS' BRIEF

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RESPONDENTS' BRIEF

PRELIMINARY FACTS

The following things should be brought to the attention of this Court at the outset:

1. REVENUE AND TAXATION CODE §225 IS NOT A TAX. IT IS A SERIES OF EXEMPTIONS WITH THE SPECIFIC PURPOSE OF REGULATING COMMERCE.

2. ALTHOUGH §225 (AND THE TAXES IMPOSED BY RESPONDENTS) OPERATE

ON GOODS HELD IN CALIFORNIA FOR SEVERAL MONTHS (OR MORE), THE STATUTE GIVES EXEMPTIONS ONLY UPON THE HAPPENING OF EVENTS OUTSIDE THE STATE AND OUTSIDE THE COUNTRY. (EXTRATERRITORIAL CONDITIONS.)

3. CERTAIN TYPES OF INTERSTATE AND FOREIGN COMMERCE MUST BE ENGAGED IN FOR THE STATUTE TO BE OPERATIVE.

THE FACTS AND THE STATUTE

The Petitioners act as dealers of goods at either retail or wholesale. They sell goods to customers located throughout the United States. Sears holds a large quantity of imported goods and a small quantity of American goods in the County of Los Angeles for distribution throughout the United States. Sears holds its goods for a period of months.

After holding the goods as described, some of the goods are sent to out-of-state customers and outlets while others are sent to California customers and outlets. The foreign goods sold or distributed to California customers are taxable under §225 while the foreign goods sold or distributed to non-California customers are not taxable pursuant to that statute.

The American goods held by Sears in the taxing jurisdiction are taxable under §225. On the basis of the evidence before it, the state court found that American goods originating in other states arrive in California for distribution or sale to other states and are taxable. 1/

SUMMARY OF ARGUMENT/INTRODUCTION

R. & T. §225 was enacted before Michelin Tire Corp. v. Wages, 423 U.S. 276, 46 L. Ed. 2d 495, 96 S. Ct. 535, was rendered by this Court. The legislative record (Case Record p. 219, last paragraph) shows no intent by the Legislature to alter the competitive status quo between domestic and foreign goods. In fact, the authority of the Federal Government to make such changes was conceded by the State Legislature to be Supreme. (Record p. 219, last sentence.)

When Michelin was handed down, the State Court of Appeal was presented with two choices. It could have "redesigned" R. & T. §225 to prevent the discriminatory effect, or it could have told the Legislature to "go back to the drawing boards." It took the latter approach. The Legislature has now created a total inventory exemption, Assembly

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1/ The Petitioners have argued that the State Court's findings on this point may not be considered by this Court (but see American Oil Co. v. Neill, 380 U.S. 451, 455-6 (1965) and Gurley v. Rhoden, 421 U.S. 200, 208 (1975) and discussion, infra).

Bill No. 66, Chapter 1150, 219(a)(4), which has the same effect on imports, but no longer discriminates between forms of commerce. In addition, the Legislature is considering paying back the taxes collected, including those at issue in this case (Senate Bill 940 of 1979).

The Petitioner, however, seeks to have this Court sustain the discrimination of the statute under misapplied constitutional law. Moreover, the Petitioner has argued that statutes which were not unconstitutional when enacted may still continue in effect, even after decisions of this Court render them unconstitutional.

The Petitioner contends that provisions of the United States Constitution do not prohibit what has become a narrow, special-interest exemption. Petitioner argues that states may, as a general rule, enact such narrow interest exemptions on various grounds.

First, Petitioner asserts that this Court must restrict the ambit of "free trade" under the commerce clause to statutes purposely discriminating against out-of-state commerce. (See p. 16, par. 2 of Petitioner's Brief.) The Petitioner (and strangely enough the Solicitor General) argue that a statute's purposes can be separated from its discrimination. Thus (concludes the Petitioner), if a statute creates discrimination then this Court must disregard it if the Legislature did not have that discrimination in mind.

The difficulty with this two-step analysis is that the commerce clause deals with

regulations, not what a legislator had in mind. The commerce clause creates an area where discriminatory effects by the states are prohibited. Neither logic nor the commerce clause allows a discriminatory regulation to exist even though the Legislature did not envision all of the discrimination created.

Next, the Petitioner and the Solicitor General argue that the commerce clause allows discriminatory regulations as long as they favor foreign interests. (Solicitor's Brief p. 8, Petitioner's p. 19.) In effect, they tell this Court that the federal control of foreign commerce is only "half exclusive." The argument is based on the unsupported assumption that the Federal Government regulates foreign commerce solely for the benefit of foreigners. The Petitioner and the Solicitor General incorrectly propose that the states may give more benefits to foreigners because they will not be hurting anyone Congress may wish to protect.

Next, the Petitioner relies on the idea that the states may place local businesses at a disadvantage. This reliance is misplaced. Unique among similar statutes, R. & T. §225 establishes a discriminatory regulation in such a way as to burden both out-of-state manufacturers and out-of-state customers at the same time. R. & T. §225 relies only upon the temporary storage of the goods in the state to apply the regulation.

Next, the Petitioner and the Solicitor General argue that compliance with the import-export clause constitutes compliance with the commerce clause. (Solicitor's Brief p. 8, Petitioner's Brief

Brief p. 20.) This argument is illogical on its face.

In any case, the foundation for the argument immediately above is not available to Petitioner. R. & T. §225 prevents the Federal Government from speaking with one voice (Michelin Tire Corp. v. Wages, supra). It changes the competitive status between foreign and domestic goods, stored in the state under exactly the same circumstances. The fact that (1) the President has sought to apply additional tariffs in order to protect domestic industry, and (2) the Solicitor General attempts to support the regulation by asserting that protective tariffs are consistent with state legislation that reduces their effect, is direct evidence that the Executive Branch of the U.S. Government cannot speak with one voice and still support R. & T. §225.

The Petitioner further argues that if this Court affirms the Court of Appeal, then many other state statutes must necessarily be invalidated. The implication of this argument is that the existence of other state statutes makes R. & T. §225 constitutional. The argument is further based on the assumption that all of the state statutes cited would be interpreted in the same way as R. & T. §225.

But R. & T. §225 is unique. It is the only statute which utilizes the mere storage in the state to impose a regulation which discriminates between both out-of-state manufacturers and out-of-state customers. 2/ Furthermore, there is no constitutional

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2/ The Florida statute (Taxation & Finance Code §196.0011) does have closely parallel language, but (continued on p. 7)

support for the proposition that one state statute can make another state statute constitutional.

The only conceivable purpose the Petitioner may have in presenting these statutes to the Court is to persuade it that it will confuse commercial affairs if it rules for the Respondents. But the opposite is the truth. The Petitioner and the Solicitor General actually propose rules which will increase confusion by allowing 50 separate systems of foreign-interstate regulation to be imposed on goods passing through the states. Even those regulations which may appear to help some foreign interests will, at the same time, hurt others. For instance, any foreign company buying

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2/ (continued from previous page)

equates "transshipment" with "in transit." The California Court's broad reading of R. & T. §225 is based upon those terms being used differently. Also §196.0011 requires contracts of sale to out-of-state customers to be in hand by the lien date. California's R. & T. §225 allows any foreign goods eventually shipped out of the state to escape taxation (see R. & T. §251).

The statutes from Georgia and Louisiana are the only other state statues making the foreign-interstate distinction (see Ga. Code Annotated §92-186-87 and La. Rev. Stat. Ann. 47-1951.3). But only goods "in transit" are exempted by those statutes. All of the other statutes do not punish one set of out-of-state customers in comparison with another.

manufacturing facilities in the U.S. will be hurt in comparison with its foreign competitors manufacturing abroad. "Helping" foreign goods is not necessarily helping foreigners.

The proposition that Congress regulates foreign commerce only to help "foreign goods" also serves as the foundation for the Petitioner's arguments concerning the many long-standing protective tariff acts (including the Tariff Act of 1930, 46 Stat. 590, and the Trade Act of 1974, 88 Stat. 1978). These "Tariff Acts" are designed to a great extent to protect domestic industry. The Solicitor General specifically does not deal with this issue.

The Petitioner, however, asserts that benefits accorded to foreign goods and not to domestic goods merely "supplement" the tariffs. (Petitioner's Brief pp. 21-22.) The argument is so illogical that it could be reversed. One could argue that since tariffs are protective in nature, further protection given by the states for domestic goods is a "supplement" to that protection.

Of course, both ideas are incorrect. The Congress of the United States is empowered to determine "what articles may be imported into this country and the terms upon which importation is permitted." Board Of Trustees Of the University Of Illinois v. U.S., 289 U.S. 48, 57. State action reducing tariffs is no more authorized than state action adding to them.

In addition, both the Tariff Acts and the U.S. Constitution require uniform tariffs.

(Art. I, Cl. 8, §1; 19 U.S.C.S. 1502(a).) The Petitioner would have this Court rule that a state may alter that uniformity.

Varying levels of state taxation are indeed a function of our federal system. But specific state regulations favoring foreign goods, while not favoring domestic goods held in the state under exactly the same circumstances, is not fair, not uniform, and not constitutional. Such regulations undermine understandings created between Congress and the Executive Branch on the one hand and foreign producers, foreign investors in this country, and this country's own businesses on the other.

This Court should not create a rule which would allow the States to regulate in this fashion. If R. & T. §225 is upheld as not reducing Federal tariffs, then every state through which imports and American goods pass, may effectively alter the foreign-interstate equilibrium for goods held at the same place, at the same time, and for the same purposes.

The Petitioner cannot avoid this effect by simply saying that different states have different taxes. (See Petitioner's Brief p. 22.) Those other states do not subject foreign goods and interstate goods to different regulation. As a result, the foreign producer and the out-of-state American producer have exactly the same burdens to face when sending their goods through any other state. California cannot take advantage of its position as a port state to oblige one manufacturer to pay burdens as the goods go through the state, while letting another manufacturer's

goods move through the state without payment.

The Petitioner attempts to avoid the effect of the Tariff Acts by asserting that the amount of difference is not substantial. (See Pet. Brief p. 27.) It relies on an average "turnover" rate of inventory. Of course, goods can be held in the state for even a full year (or more) and still enjoy the benefit of the regulation. Thus, a full 1 3/4% effect is possible. In addition, the amounts of differential resulting from R. & T. §225 are, in some cases, actually more than the amount of certain tariff rates.

In conclusion, the Petitioner seeks to have this Court uphold a regulatory power in the States to differentiate between foreign and interstate goods passing through a state. They seek to have this Court uphold such regulatory power, even though the California Legislature has effectively repealed R. & T. §225.

ARGUMENT

I
THE STATUTE

A. The Petitioners' Goods Are Not In Transit:

It is accepted by all of the parties that any goods which are in transit through a state are immune under the commerce clause (see

Minnesota v. Blasius, 290 U.S. 1, 78 L.Ed. 615, 33 S.Ct. 299 (1913)).

The Petitioners do not claim that their goods are immune because they are in transit. They claim rather, an exemption created by California's Revenue and Taxation Code §225 (reproduced here as Appendix "A" and hereinafter cited as R. & T. §225).

The California Court of Appeal interpreted R. & T. §225 to exempt goods held in California until sold or distributed (see Zee Toys, Inc. v. Sears, Roebuck & Co. v. County of Los Angeles, 85 Cal.App.3d 763, at pp. 770 to 772, 149 Cal. Rptr. 750 (1978)).

Thus, the goods involved in this case were not moving, or otherwise in transit. But R. & T. §225 does impose its regulatory conditions merely on the basis of their temporary presence.

B. R. & T. §225 Creates an Unequal Tax Treatment Between Forms Of Interstate Commerce Solely On the Basis Of Their Place Of Destination and Their Point Of Origin.

Goods flowing from other states into California for warehousing and then on to Mexico, are exempt under R. & T. §225 (unless those goods are assembled or painted, i.e., some form of manufacturing process, in California). But

similar goods flowing from other states into California and stored in the same warehouse prior to transshipment on to other states are taxed. Thus R. & T. §225 directly discriminates against some forms of interstate commerce in favor of other forms of interstate commerce (those which flow out of the United States into foreign commerce).

R. & T. §225 discriminates between competitors in interstate commerce who warehouse their goods in California for transshipment, depending upon both the destination and the point of origin of the goods. For instance, R. & T. §225 requires that the conditions of foreign manufacture and out-of-state sale or distribution be satisfied before the exemption applies.

Furthermore, goods assembled in California and shipped outside the United States are taxable, but goods assembled in another state and shipped through California are exempt. So, R. & T. §225 favors goods assembled in other states destined for foreign commerce, while it discriminates against goods assembled in California destined for that same foreign commerce. This is true, even if the goods assembled in California came from other states before being assembled.

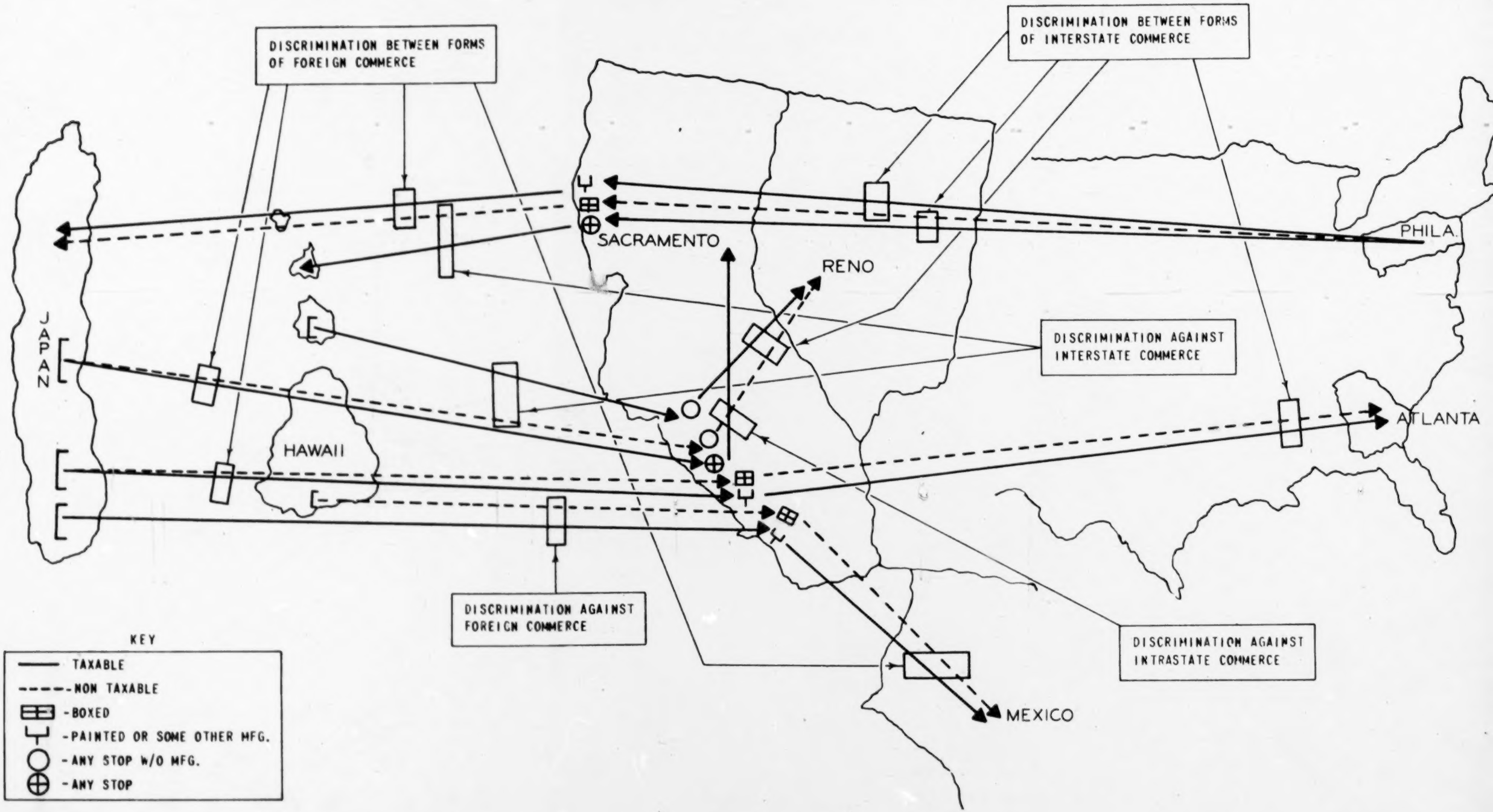
R. & T. §225 distinguishes between types of foreign commerce and distinguishes between types of interstate commerce.

C. R. & T. §225 Redirects the Free Flow Of Commerce

California is precluded from taking any action impeding the free flow of trade between States. See Freeman v. Hewit, 329 U.S. 249. R. & T. §225 impedes the free flow of commerce by its complex extraterritorial conditions. These conditions encourage some producers to store goods in California, while discouraging others. Those conditions also encourage out-of-state exporters to paint their goods in other states but to package them in California (see the definition of "manufacturing" used in §225, App. A). Thus, the free flow of commerce is selectively redirected. 3/

Because R. & T. §225's conditions are extraterritorial and many-faceted, a map has been produced to demonstrate what the conditions do (see p. 13a).

3/ When one considers that many other states exempt all goods coming into the state (whether foreign or domestic), the effect is compounded (see Collection of Statutes described in Amicus Curiae Brief on behalf of Pioneer Electronics, etc., in support of Petition for Certiorari, Exhibit D).


DISCRIMINATION BETWEEN FORMS OF FOREIGN COMMERCE
DISCRIMINATION BETWEEN FORMS OF INTERSTATE COMMERCE
SACRAMENTO
PHILA.
RENO
JAPAN
DISCRIMINATION AGAINST INTERSTATE COMMERCE
HAWAII
ATLANTA
DISCRIMINATION AGAINST FOREIGN COMMERCE
DISCRIMINATION AGAINST INTRASTATE COMMERCE
MEXICO
KEY
TAXABLE
NON TAXABLE
-BOXED
-PAINTED OR SOME OTHER MFG.
-ANY STOP W/O MFG.
-ANY STOP

II
THE COMMERCE CLAUSE

A. The Arguments Of the Solicitor General and the Petitioner

1. The Petitioner's Arguments

a. The Petitioner (and the Solicitor General) Contend That the Exclusive Authority Of Congress to Regulate Foreign Affairs and Commerce Is Only "Half-Exclusive." (Pet. Brief pp. 11, 19-20.)

Surprisingly, the Solicitor General and the Petitioner have both argued that the States may

regulate foreign commerce, but only if they discriminate in favor of foreign goods. The assumption underlying this argument is that Congress has (or will) regulate only in favor of foreign interests. Building on this foundation, the Petitioner and the Solicitor General point to various statutes which favor air carriers coming into or going out of the country. The Solicitor General and the Petitioner claim that tax exemptions for all flights going into or out of the country parallels R. & T. §225 (which favors only some imports and exports, but not all).

The Petitioner and Solicitor General thus conclude that the States may favor foreign goods over interstate goods passing through their jurisdictions.

Both of them fail to deal with the fact that Congress, when considering levies directly on the goods themselves, has sought to benefit interstate and domestic goods over foreign goods (see the Tariff Acts, esp. 19 U.S.C. 1202, 1338, 2153).

Both of them fail to deal with the fact that Congress often makes concessions for foreign interests in order to achieve reciprocal benefits for American interests abroad (19 U.S.C. §2112(a)).

Finally, both of them fail to deal with the fact that R. & T. §225 will actually hurt foreign interests which operate manufacturing plants in America. [4/] R. & T. §225 would have this effect

[4/] See Appendix "B" excerpts from "Conditions of Competition in the Western U.S. Steel Market

(continued on p. 16)

by subjecting the local operation of a Japanese company to property taxes on its goods flowing through the state, while not imposing similar burdens on a Japanese company not doing any manufacturing in this country.

Thus, the Petitioner and Solicitor General, in effect, require this Court to utilize selective logic when reviewing R. & T. §225.

b. The Petitioner Contends That This Court Must Ignore the Conditions Imposed By R. & T. §225 If Those Conditions Operate Against In-State Businesses (Pet. Brief pp. 11-13). 5/

The Petitioner seeks to further restrict the vision of this Court. It implies that discrimination

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4/ (continued from previous page)

between certain domestic and foreign Steel Products" United States Int'l Trade Comm. Pub. 1004, September 1979.

5/ Petitioner relies on Alaska v. Arctic Maid, 366 U.S. 199 (1961) and Allied Stores v. Bowers, 358 U.S. 522 (1959) (concurring opinion). The Petitioner's logic seems to be based on the assumption that in-state businesses have more influence with state legislatures than out-of-state businesses. In light of the complexity of today's interstate and foreign commerce, this is difficult logic to support.

against "local" business cures a statute which also discriminates between forms of interstate and foreign commerce. The Petitioner cites no authority for this proposition.

c. The Petitioner and the Solicitor General Argue That the Only Discrimination Prohibited By the Commerce Clause Is That Which, On Its Face, Favors Local Business At the Expense Of Interstate Commerce (Pet. Brief pp. 13-18).

In an effort to avoid the impact of this Court's opinion in Boston Stock Exchange v. State Tax Comm., 429 U.S. 318 (1976), the Petitioner asks this Court to ignore certain features of the statute.

The Petitioner preliminarily asserts that the exemption had the purpose of reversing the flow of commercial traffic away from the California (see Pet. Brief p. 5, par. 2). 6/ But in its commerce clause argument the Petitioner states,

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6/ The Assessor's interpreation of the law is not "questionable" as the Petitioner asserts there (see Craig Corp. v. County of Los Angeles, 51 Cal. App. 3d 909, 124 Cal. Rptr. 621 (1975) and Keesling, Michelin Tire Corporation v. Wages: The Demise of the Original Package Doctrine, 50 U.S.C. Law Review 719 at pp. 740-742 (1977).

"No preference is accorded local commercial interests."
(Pet. Brief p. 17.)

It may be that Petitioner is saying that the exemption must be seen only with logical blinders on. The Petitioner may be suggesting that this Court ignore the fact that R. & T. §225 requires a host of foreign and interstate prerequisites to be satisfied before the exemption is allowed.

If so, the Petitioner is asking this Court to separate an exemption from its conditions. R. & T. §225 requires a series of conditions. These conditions are: foreign manufacture, foreign commerce, no manufacturing while in the state, followed by interstate commerce. It operates to give the exemption only when all of these pre-requisites are satisfied. The Petitioner simply asks this Court to ignore those conditions.

Once this feat is accomplished, the Petitioner urges this Court to apply the statutory purpose, not to the conditions for receiving the exemption, but to the exemption "itself."

Based upon this foundation, the Petitioner asserts that this Court must ignore Boston Stock Exchange v. State Tax Comm., supra, because in that case the conditions for the exemption had the purpose of diverting business into the state. In contrast, says the Petitioner, the conditions for receiving the exemption do not serve the purpose of diverting traffic into the state.

By its argument, the Petitioner makes clear what has been suspected: there is no local purpose to the conditions for the exemption.

R. & T. §225 would achieve exactly the same result if there were no involved and conflicting conditions. 7/

The Petitioner, in its attempt to distinguish Boston Stock Exchange v. State Tax Comm., supra, has offered no state purpose for the conditions embodied in R. & T. §225. 8/

7/ In fact, the California Legislature has already applied the exemption to all inventory without requiring any conditions. The regulatory character of R. & T. §225 has thus been eliminated. The Legislature is also considering refunding the taxes collected (see Assembly Bill 66 and Sen. Bill 940, supra).

8/ In fact, the Petitioner makes clear that R. & T. §225's conditions are unconstitutional under the equal protection clause. In Allied Stores v. Bowers, 358 U.S. 522 (1959), this Court ruled that an exemption can be sustained on equal protection grounds if there is a rational basis for the classification created by it. The Petitioner has pointed to no rational purpose underlying the classification created by R. & T. §225.

d. The Petitioner and the Solicitor General Contend That the Nation Can Speak With One Voice Despite State-Initiated Tariff Reductions. They Further Contend That Compliance With the Import-Export Clause Is the Same Thing As Compliance With the Commerce Clause (Pet. Brief pp. 18-19).

First, the Petitioner repeats its contention that in this case the constitution permits the States to regulate between forms of commerce. Next, the Petitioner announces that R. & T. §225 "furthers" commerce clause policies by its regulatory conditions. Finally, the Petitioner argues that R. & T. §225 comports with the import-export clause purposes as announced by this Court in Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976).

The Petitioner and the Solicitor General assert that the Court must again put on its blinders when determining whether a regulation permits the Federal Government to "speak with one voice." The Petitioner and Solicitor General actually suggest that this Court cannot consider the effect of the statute on goods not exempted.

Thus, the Petitioner and Solicitor General ask this Court not to consider the goods (both foreign and interstate) which do not satisfy the conditions

imposed by R. & T. §225. 9/

The Petitioner and Solicitor General imply that even though some foreign interests are harmed by R. & T. §225, and even though interstate interests are hurt, the statute is saved simply because it exempts some foreign goods. Both the Petitioner and Solicitor General ignore the fact that tariffs and other regulations of foreign commerce depend, for their effect, on the existence of a class of goods not subject to duty, i.e., domestic goods.

The Petitioner has failed to deal with the fact that the Tariff Acts require uniformity and are in large measure meant to protect the very interstate commerce that the Petitioner would ignore.

9/ Perhaps one of the most unusual aspects about this argument is that the Solicitor General argued in a previous case, only one year ago, that the effects on property not involved in that case, and the consequent effect on the competitive situation, should be reviewed by this Court in order to determine the validity of a uniform tax (see Brief of Solicitor General in Japan Lines Ltd. v. County of Los Angeles, No. 77-1378, p. 29). The Solicitor General appears to be arguing that when favoring any foreign interest (or part thereof), the States are subject to less review by this Court.

e. The Petitioner and Solicitor General Argue That the Existence Of Federal Exemptions For All "Foreign Flights" Validates a State Exemption For Some Foreign Goods. They Further Argue That the Existence Of These Statutes Shows a Consistent Federal Policy Favoring Foreign Goods (Pet. Br. pp. 19-20).

Now the Petitioner asks this Court to take off the blinders. The Petitioner asserts that this Court's treatment of foreign commerce in Japan Line Ltd v. County, supra, compared with interstate commerce, shows that the States may go further in regulating against interstate commerce. Both the Petitioner and the Solicitor General argue that an interpretation of the United States Constitution requiring the States to refrain from certain action actually constitutes constitutional authorization for more action in the same "direction." 10/

10/ We have already seen that favoring some foreign goods is not necessarily favoring all foreign interests. The "direction" called for by any particular constitutional requirement would not be a very clear one under the rule proposed by the Petitioner and Solicitor General.

The Petitioner and the Solicitor General continue to focus on the comparison between interstate and foreign goods when it suits their arguments. They refer to federal exemptions in airline gas and "service" taxes. Although they close their eyes to the interstate-foreign comparison in connection with tariffs, the Petitioner and Solicitor General open them when reviewing these exemptions. Neither of them point to the amount of imports or exports shipped by air.

But the open eyes of the Petitioner and Solicitor General are only half open. They ignore the fact that R. & T. §225 does not apply to goods eventually sold to California customers. The federal exemptions apply whether the flight ends in California or not.

Thus, the conclusion of the Solicitor General that federal statutes are consistent with R. & T. §225 is based upon the ability to see comparisons at some times, but not at others. This "selective logic" is the only thing that is consistent with R. & T. §225.

f. The Petitioner Argues That This Court Cannot Accept a State Court's Characterization Of the Ambit Of a Regulation. (Pet. Brief pp. 23-29.)

The Petitioner asserts before this Court, for the first time, that there are no "facts." It characterizes the Court of Appeal's determination of the ambit of the statute as an assumption.

The Petitioner simply ignores the facts before the Court of Appeal. Those facts included evidence to the effect that there is a substantial stream of interstate commerce going through California (see Zee Toys, Inc. v. County, 85 Cal. App. 3d at p. 768, 149 Cal. Rptr. at p. 754). In its brief before that Court, the Petitioner simply assumed that the amount of interstate traffic was small (see Court of Appeal Respondent's (Sears') Brief, p. 48) (but see App. B).

Now, since Zee Toys is no longer a part of the action, the Petitioner asserts that there are no facts to determine the impact of R. & T. §225 on interstate commerce. The Petitioner concludes that the statute must, therefore, be constitutional.

Next, the Petitioner ignores the effect which is most clearly demonstrated by its own fact situation. (See Stipulation of Facts herein.) R. & T. §225 clearly distinguishes between (1) foreign commerce eventually resulting in an out-of-state sale or distribution and (2) other foreign commerce.

g. The Petitioner Argues That Since It Is Likely That Foreign and Interstate Goods Will Escape Taxation In California, This Court Should Assume That No Interstate Goods Are Taxed. (Pet. Brief p. 26 fn. 17.)

The Petitioner contends that "interstate as well as foreign goods may never become subject to California property tax." The implication is that if they are not taxed, there is no discriminatory effect.

The Petitioner, at the outset, ignores the inhibiting effect of a regulation on a foreign or interstate manufacturer in sending his goods through California. (See Boston Stock Exchange v. State Tax Comm., supra, at p. 334 fn. 13.)

The Petitioner also ignores the fact that if property taxes can be avoided, there would be no reason to enact an exemption. It also ignores the added cost of avoiding a tax. Under R. & T. §225, foreign goods will not have to pay that cost. American goods will pay that cost.

h. The Petitioner Asserts That Some Of Its Goods Were Taxed At a Rate Of 1/2% Ad Valorem and That Such a Rate Is De Minimus. (Pet. Brief pp. 22-23.)

The Petitioner refers to an average amount of time its goods are in the jurisdiction, concludes that the "effective" rate on all of its goods is 1/2% of their value, and asserts that this is too small to notice.

The Petitioner ignores the fact that it has placed this matter before this Court and is contending that all of the States are allowed to enact similar regulations against interstate goods passing through their jurisdictions.

The Petitioner further ignores the fact that the Tariff Acts regulate the foreign-domestic difference in amounts as low as 0-3% ad valorem. (See App. C, herein.) The Petitioner does not state why a State regulation amounting to up to 1 3/4% is not important when the U.S. Congress has seen fit to impose tariffs in less than that amount. (The tax on goods held for one year is effectively 1 3/4%. See Pet. Brief p. 23.)

The Petitioner also ignores the fact that the amount of difference created by R. & T. §225 is far more than that created by the regulation in Boston Stock Exchange v. State Tax Comm., supra (429 U.S. at p. 334).

i. The Petitioner Argues That a Regulation If Valid Under a Prior State Of the Law, Will Continue to Be Valid Under a New State Of the Law. Petitioner Further Argues That a Regulation's Discriminatory Effects May Be Ignored If Not Caused By an "Unfriendly Attitude" By the Legislators Enacting It. (Pet. Brief p. 28 fn. 22.)

The Petitioner asserts that because part of the statute was consistent with the original package doctrine before Michelin Tire Corp. v. Wages, supra, all of it should be valid now. 11a/ The Petitioner relies on First Federal Savings & Loan Assoc. v. State Tax Comm., 437 U.S. 255 (1978) for this proposition. (Pet. Brief p. 28 fn. 22.)

In making this argument (i.e. that R. & T. §225 had no effect before Michelin Tire Corp. v. Wages, supra), the Petitioner ignores its arguments below; that no statute would ever be enacted which conformed to an already existing constitutional immunity (see Sears Brief before the Court of Appeal, pp. 24-27).

The Petitioner next contends that the California Legislature did not display an unfriendly attitude toward interstate commerce. Of course, a lack of "unfriendly attitude" will not validate a statute. But, in any case, the Petitioner ignores

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11a/ The Solicitor General points out that R. & T. §225 is not the same as the original package doctrine as interpreted before 1976 (Solicitor General's Brief p. 10 fn. 5).

the "unfriendly attitude" toward interstate and foreign commerce resulting in exportation. Without any constitutional support, R. & T. §225 discriminates between both types of commerce. It discriminates between them on the basis of any amount of "manufacturing" (as opposed to packaging and labelling, for instance). As the Solicitor General points out, R. & T. §225 also gives more advantage to foreign goods than the original package doctrine ever did (see Solicitor General's Brief p. 10 fn. 5).

B. The Selective Exemption Is Prohibited By the Commerce Clause, and Involves the Same Situation As Was Before This Court In Boston Stock Exchange v. State Tax Comm., Supra.

1. This Court Has Specifically Endorsed a "Per Se" Approach In Dealing With Selective State Economic Regulations Of Commerce.

The Petitioner emphasizes its theory that no statute can be unconstitutional without "additional" evidence.

Of course, this Court has reviewed many statutes on the basis of the language present. It has addressed the precise issue raised by Petitioner. In Philadelphia v. New Jersey,

437 U.S. 617 (1978) the Court said,

> "The opinions of the Court through the years have reflected an alertness to the evils of 'economic isolation' and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people. Thus, where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected." (437 U.S. at pp. 623-624.) (Also see H. P. Hood & Sons v. DuMond, 336 U.S. 525, 535.)

But what about partial economic protection? What if only part of out-of-state commerce is affected?

This Court previously answered that question in Boston Stock Exchange v. State Tax Comm., supra. This Court faced the problem of a statute which caused one part of interstate commerce to be taxed while another part was not. The Court stated,

> "A State may no more use discriminatory taxes to assure that nonresidents direct their commerce to business within the State than to assure that residents trade only in intrastate commerce. As we stated at the outset, the fundamental purpose of the Clause is to assure that there be free trade among the several

States. This free trade purpose is not confined to the freedom of trade with only one State; it is a freedom to trade with any State, to engage in commerce across all State boundaries." (429 U.S. at p. 355) (emphasis added).

The Court later affirmed that state statutes which divert commerce from other states by this means are ". . . virtually per se illegal." (429 U.S. at p. 336.)

2. Neither Boston Stock Exchange v. State Tax Comm. Nor Philadelphia v. New Jersey Can Be Avoided On the Ground That Foreign Commerce Is Involved. In Fact, the Regulation Of Foreign Commerce Is an Exclusive Federal Power.

The Petitioner and Solicitor General seek to avoid the rule in Boston Stock Exchange by pointing out that foreign commerce is involved here, and was not involved in Boston Stock Exchange.

But both the Solicitor General and this Court have repeatedly announced that the area of foreign commerce is more exclusively under Federal control than interstate commerce. (See e.g., Buttfield v. Stanahan, 192 U.S. 470, 492-493 (1904); Henderson v. Mayor of New York, 92 U.S. 259, 273 (1875); Hines v. Davidowitz, 312 U.S. 52 (1941) and the Solicitor General's Brief in Hines v. Davidowitz,

p. 83 and J. W. Hampton v. U.S. (276 U.S. 394), at pp. 26-27.)

This Court recently held a uniform state tax unconstitutional because it affected this exclusive area. With the encouragement of the Solicitor General, this Court, in Japan Lines Ltd. v. County, supra, held:

> "Second, a state tax on the instrumentalities of foreign commerce may impair federal uniformity in an area where federal uniformity is essential. Foreign commerce is pre-eminently a matter of national concern. 'In international relations and with respect to foreign intercourse and trade, the people of the United States act through a single government with unified and adequate national power.' Board of Trustees v. United States, 289 U.S. 48, 59 (1933)."
> (Slip Opin. p. 13.)

The Solicitor General and the Petitioner accept the rule that Federal control over foreign commerce is more complete than over interstate commerce. But they apply the rule to only a portion of foreign commerce. They believe that the Federal power over foreign commerce is cut into two "parts." The "part" that involves the power to discriminate against foreign commerce, they believe, is exclusive (see Solicitor General's Brief p. 8).

On the other hand, they argue that the part of the Federal power involving discrimination

in favor of foreign commerce (and against interstate commerce) is not so exclusive. In fact, the Petitioner and Solicitor General argue that any State-enacted foreign preference is valid. They thereby imply that this "part" of foreign commerce is totally "non-exclusive."

But even the power to regulate interstate commerce requires some Federal exclusivity (Boston Stock Exchange v. State Tax Comm., supra).

The result is that the Petitioner and Solicitor General would create a new third category of exclusivity of Federal power over commerce. That third category (including the Federal power to benefit foreign commerce) would require even less Federal control than interstate commerce.

Despite this bifurcation of Congress' "exclusive" power to regulate foreign commerce, there is abundant authority for the proposition that the States can no more favor foreign commerce, than discourage it. Board of Trustees v. U.S., supra (cited with approval in Japan Lines Ltd. v. County, supra, at p. 13) states:

> "The control of importation does not rest with the State but with Congress." (289 U.S. at 59.)

And in discribing the character of the control, this Court stated:

> "The Congress may determine what articles may be imported into this country and the terms upon which importation is permitted." (289 U.S. at p. 57) (emphasis added).

Thus, the regulation of imports is exclusively Federal.

In making the argument that this is not true, the Solicitor General's office ignores its prior statements to the contrary. Even as early as 1928, the Solicitor General took the position that the power to enact tariff regulations was a regulation of foreign commerce which is exclusively Federal (see Solicitor General's Brief in J. W. Hampton v. U.S., supra, at pp. 26-28). [This same argument was made by the Solicitor General in 1933 in Board of Trustess v. U.S., supra (see Solicitor General's Brief therein at pp.).] Finally, in Japan Line Ltd v. County, supra, just last year, the Solicitor General's office argued:

> "This Court has held that a state tax or regulation that disadvantages interstate of foreign commerce simply because it is interstate or foreign interferes with the exclusive national authority to regulate such commerce. . . ." (Solicitor General's Brief in Japan Line Ltd. v. County, supra, at p. 19.)

The "half-exclusive" argument not only ignores the cases of this Court and the statement of the Solicitor General's Office, it also ignores the very nature of the tariff power. The power does not exist for foreign interests only (as Petitioner and Solicitor General assume). It exists for Americans, too.

As this Court said in Board of Trustees:

"The laying of duties is 'a common means of executing the power' [to regulate foreign commerce] [citation]. It has not been questioned that this power may be exerted by laying duties 'to counter-vail the regulations and restrictions of foreign nations' [citation]. And the Congress may, and undoubtedly does, in its tariff legislation consider the conditions of foreign trade in all its aspects and effects. Its requirements are not the less regulatory because they are not prohibitory or retaliatory. They embody the congressional conception of the extent to which regulation should go."
(289 U.S. at p. 58) (emphasis added).

Thus, the argument that the States can go "further" than federal regulations is both logically and legally absurd. Congress has the power to determine to what extent regulation should go, not the States. Congress has the power to retaliate or not; to protect or not; and to prohibit or not. The States do not have those powers. In short, Congress has the power to apply burdens ". . . selectively to encourage or discourage any importation. . . ." (Michelin Tire Corp. v. Wages, supra, at p. 286), not the States. (Also see Charleston & Western Carolina Railway Company v. Varnville Furniture Company, 237 U.S. 597, 604 (1915); Penna. v. Nelson, 350 U.S. 497, 504 (1956).)

The exclusivity of Congress' power to impose (or not to impose) duties in certain specific amounts is further supported by U.S. Const. Art. I, §10,

Cl. 2, prohibiting the States from imposing imposts or duties.

Contrary to the arguments presented by the Petitioner and the Solicitor General, the policies of the import-export clause do not only prohibit discouragement of foreign goods, but prohibit encouragement as well. In Michelin Tire Corp. v. Wages, supra, a nondiscriminatory property tax was held valid because,

"By definition such a tax does not fall on imports as such because of their place of origin. It cannot be used to create special protective tariffs or particular preferences for certain domestic goods, and it cannot be applied selectively to encourage or discourage any importation in a manner inconsistent with federal regulation." (423 U.S. at 286) (emphasis added).

The Petitioner's claim that Michelin Tire Corp. v. Wages, supra, stands for the proposition that the States may encourage importation is totally misplaced.

3. The Proper Conduct Of Foreign Affairs, Demands That the Federal Government Exercise Exclusive Authority Over Economic Regulation Of Imports.

It should be emphasized again that R. & T. §225 is not a tax. It is an exemption which is made narrow by several pre-conditions. Those conditions encourage certain acts to be carried out in foreign countries and in other states before the exemption will be given. (The Petitioner claims that such encouragement was never intended, but that statement does not erase the language of the statute.)

The Federal Government utilizes customs duties as its means of differentiating between foreign goods and domestic goods. It utilizes this power for many purposes:

a. To regulate foreign commerce (Preamble to the Tariff Act of 1930, 46 Stats. 497).

b. To protect domestic industry (Preamble to the Tariff Act of 1930, supra; The Trade Act of 1974, 19 U.S.C. §§2102, et seq.; also see collection of Presidential Proclamations in Appendix D).

c. To retaliate for acts by other countries (Board of Trustees v. U.S., supra,

at p. 58).

d. To equalize the cost of marketing foreign goods with domestic goods (19 U.S.C. 1303 and 1336).

When the Federal Government utilizes its tariff power, the level of tariffs must be uniform throughout the United States (U.S. Const. Art. I, §8, Cl. 1).

It is obvious that the area is extremely sensitive. A German company importing through an Eastern state may well object because a Japanese competitor receives an effective tariff reduction by importing through California. The effect is magnified when one remembers that the Petitioner and the Solicitor General are proposing that all of the States can make R. & T. §225 adjustments.

Pursuant to its power to lay duties, the Federal Government may choose to ". . . countervail the regulations or restrictions of foreign nations. . . ." (Board of Trustees v. U.S., supra, at p. 58.)

It is no wonder that this Court has repeatedly held that the Federal power to regulate foreign affairs is not subject to the concept of concurrent State jurisdiction (Hines v. Davidowitz, 312 U.S. 52, 63 (1941); U.S. v. Curtis-Wright, 299 U.S. 304, 315-320 (1936); U.S. v. Belmont, 301 U.S. 324, 331-332 (1937); Calif. Bankers Assoc. v. Shultz, 416 U.S. 21, 59 (1974); and MacKenzie v. Hare, 239 U.S. 306, 311 (1915)).

Clearly tariffs and distinctions between foreign and domestic goods are intertwined with international relations (see Board of Trustees v. U.S., supra, at p. 59). The argument that the States may be more "generous" than the Federal Government is no answer to the exclusive Federal power, because the Tariff Acts,

> ". . . embody the congressional conception of the extent to which regulation should go." (Board of Trustees v. U.S., supra, at p. 58) (emphasis added).

The concurring opinion by Mr. Justice Stewart (joined by Mr. Justice Brennan) in Zschernig v. Miller, 389 U.S. 429, 443 (1968) is particularly appropriate to this case:

> "The Solicitor General, as amicus curiae, says that the Government does not 'contend that the application of the Oregon escheat statute in the circumstances of this case unduly interferes with the United States' conduct of foreign relations.' But that is not the point. We deal here with the basic allocation of power between the States and the Nation. Resolution of so fundamental a constitutional issue cannot vary from day to day with the shifting winds at the State Department. Today, we are told, Oregon's statute does not conflict with the national interest. Tomorrow it may. But, however that may be, the fact remains that the conduct of OUR FOREIGN AFFAIRS IS ENTRUSTED UNDER THE CONSTITUTION TO THE

> NATIONAL GOVERNMENT, not to the probate courts of the several States."

The unavoidable conclusion from the decisions of this Court and from the prior statements of the United States Solicitor General is that the power to regulate imports is exclusively Federal.

As this Court stated in Buttfield v. Stranahan, 192 U.S. 471, 492-493 (1904) and Brolan v. United States, 236 U.S. 216, 218-219 (1915):

> ". . . it is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries; not alone directly by . . . embargo statutes, but indirectly, as a necessary result of provisions contained in tariff legislation." (Emphasis added) (also see U.S. v. 12 200 Ft. Reels, 413 U.S. 123, 126 (1972)).

In light of the repeated assertions of both this Court and the Solicitor General, it would be peculiar, indeed, to believe that Congress' power over tariff and import regulations is not complete and exclusive.

4. The Exclusive Authority of Congress (Board of Trustees v. U.S., Supra; and Buttfield v. Stranahan, Supra) and the Area Of Freedom From State Regulation (Boston Stock Exchange v. State Tax Comm., Supra) Are Not Decreased Because Of the Petitioner's Arguments Concerning the Purpose Of R. & T. §225.

As already pointed out, the Petitioner and the Solicitor General utilize confused reasoning to avoid this Court's ruling in Boston Stock Exchange v. State Tax Comm., supra. They point out that the discrimination in Boston Stock Exchange was deliberately created by the New York Legislature.

In an attempt to draw a distinction, the Petitioner and the Solicitor General state that the discrimination involved in R. & T. §225 does not benefit local business. The Petitioner and the Solicitor General apply the legislative purpose (benefitting local business) to the exemption, but not to the conditions for the exemption.

But the conditions of R. & T. §225 are part of the statute. R. & T. §225 requires the goods to be put through a complex pattern of foreign and interstate commerce before the exemption will be allowed. 11/ The Petitioner and the Solicitor

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11/ The property must be ". . . manufactured or produced, . . . (2) outside of the

(continued on p. 41)

General want to divide R. & T. §225 in half. They want this Court to ignore its conditions. They want this Court to validate R. & T. §225 on the ground that the words ". . . shall be exempt from taxation" embody a legislative purpose.

This unusual argument results in an unusual effect. If the legislative purpose of helping California's economy is applied only to some of the words of R. & T. §225, then there is no legislative purpose to support the rest.

The logical effect of the argument made by Petitioner and the Solicitor General is to assert that the conditions of R. & T. §225 have no purpose.

Those conditions, requiring certain extra-territorial acts, are regulatory. The California Court of Appeal pointed out that they regulate foreign and interstate commerce.

Perhaps regulations of commerce can be saved by having a health or safety purpose. To a lesser extent, economic purposes may be considered by this Court (see H. P. Hood & Sons v. DuMond, supra). But it seems absurd to attempt to avoid Boston Stock Exchange v. State Tax Comm. on the ground that the exemption "portion" of R. & T.

11/ (continued from previous page)

United States . . ." Then it must be ". . . brought into this state . . ." and it must be ". . . for transshipment out of this state. . . ." It must also be "for sale in the ordinary course of trade or business. . . ."

§225 has a purpose, but that the condition "portion" does not.

No health or safety purpose has ever been used to support R. & T. §225. If its purpose is economic, then it falls pursuant to Boston Stock Exchange. The Petitioner has not put R. & T. §225 in a better constitutional position by asserting that the exemption "portion" of the statute has a purpose and leaving this Court to imagine what purpose supports the condition "portion."

Not only does this line of argument leave the "conditions" of R. & T. §225 without any purpose, it also demonstrates that the new complete inventory exemption in California achieves the same purpose of R. & T. §225 without imposing extra-territorial conditions.

5. The Exclusive Authority Of Congress Over Import Regulations and the Area Of Freedom From State Regulation Can Be Maintained Without Using R. & T. §225's Complicated Conditions. At the Same Time the Economic Goal of the State Will Be Achieved.

The California State Legislature has now altered its tax structure relative to inventory. All inventory is now exempt from taxation (see Assembly Bill No. 66, supra). (Repayments of these taxes are now also being considered by the Legislature.) This solution to the constitutional

difficulties of R. & T. §225 demonstrates that the Legislature can achieve the purpose of exempting goods passing through the State, without imposing an array of involved extraterritorial conditions.

Another alternative, now in effect in several states, is to exempt goods which are in the process of any movement which begins or ends outside the state. 12/ In any case, virtually all of the statutes cited by Petitioner demonstrate that R. & T. §225's purposes could have been achieved by other means with less impact on foreign and interstate commerce.

These alternative methods, and the Petitioner's argument concerning the purpose of the extra-territorial conditions, do not help the Petitioner's case. They hurt it.

This Court has held that even if a statute does not regulate in an area reserved for exclusive Federal control, it may still be unconstitutional. In Pike v. Bruce Church, 397 U.S. 137 (1970) this Court held that if a statute regulates even-handedly to effectuve a legitimate public purpose,

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12/ These statutes are Conn. Gen. Stat. Ann. §12-95(a); Ill. Stat. Ann. Ch. 120, §500.21; Kan. Stat. Ann. §79-201(f); Ky. Rev. Stat. §132-095; N.C. Gen. Stat. §105-275(10) (1977 Supp.); and Wisc. Stat. Ann. §70.111 (West). Contrary to the argument made by the Petitioner regarding the Tariff Acts, the existence of these statutes does not help its case. They demonstrate how the job can be done properly.

and if its effects on interstate commerce are incidental, then the Court will look to see if the burden on commerce is excessive in relation to the local benefits. One of the criteria for determining whether the burden is excessive is whether the local purpose can be achieved by other means with a lesser impact on interstate activities. (Also see Raymond Motor Transp. v. Rice, 434 U.S. 429 (1978); and Philadelphia v. New Jersey, supra.)

This Court does not have to reach the burden question because (1) the regulation of imports is exclusively Federal, (2) R. & T. §225 does not regulate evenhandedly, and (3) the Petitioner's arguments raise a question as to whether the conditions of R. & T. §225 serve any purpose. But if it did reach the question of burdens, this Court has at hand six statutes which create no discrimination between forms of commerce with contacts out of the state. There are also many more with less impact on the regulation of imports.

R. & T. §225 stands out as perhaps the worst possible way to achieve the object intended.

The Court of Appeal recognized that fact, and attempted to prevent R. & T. §225's operation at the state level. The Legislature repealed it by implication. But now the Petitioner wants this Court to validate it, not only to serve its own interests, but also to stand as an example for all 50 States.

6. Petitioner Cannot Avoid Boston Stock Exchange, Board of Trustees, and Buttfield v. Stranahan By Changing Its Position Regarding the "Facts."

The Court of Appeal reviewed R. & T. §225 in the context of the facts before it. Those facts included the existence of two streams of commerce, one foreign, the other interstate (see 85 Cal. App. 3d at p. 768, 149 Cal. Rptr. at 754). (The evidence also demonstrated that some foreign goods would be taxed under R. & T. §225 while others would not.)[13/] The state court's task was to determine

[13/] Foreign commerce, involving goods which are eventually sold to in-state customers, is taxed. Foreign commerce, involving goods which are eventually sold to out-of-state customers, is not taxed. The arbitrary conditions of R. & T. §225 create an exception in this latter category. Even though the goods are sold to out-of-state customers, they will be taxed if they are even partially "manufactured" in California. As can be seen from the map on page 13a and this discussion, the conditions of R. & T. §225 create a confusing array of preferences.

If this Court does not accept the determination of the Court of Appeal as to discrimination against interstate commerce, and if this Court determines that any additional facts are required, it is respectfully requested that this case be remanded for the taking of evidence on the existence of any discrimination.

the interpretation and logical effects of R. & T. §225.

The Petitioner urged the Court of Appeal to adopt a broad interpretation of R. & T. §225. But the Petitioner did not refute the facts before that Court; did not object to consolidating the case with Zee Toys; and did not object on the ground that the evidence was insufficient. The Petitioner only assumed that the amount of interstate traffic through California was small (see Pet. Brief below pp. 47-48).

Now the Petitioner attempts to "pull the rug" out from under the state court. The Petitioner argues that there is "no" evidence of discrimination.

But it is too late for the Petitioner's contention. Where a state court has determined that an effect of a state statute exists, this Court has held such determination to be conclusive. As this Court said in American Oil Co. v. Neill, supra, at pp. 455-456 (1965) and Gurley v. Rhoden, supra, at p. 208 (1975):

> "When a state court has made its own definitive determination as to the operating incidence, our task is simplified. We give this finding great weight in determining the natural effect of a statute, and if it is consistent with the statute's reasonable interpretation it will be deemed conclusive." (Emphasis added.) 14/

14/ The Petitioner may wish to rely on Diamond National Corp. v. State Board, 425 U.S. 268 (1976)

(continued on p. 47)

The Petitioner's new position regarding the facts should not be accepted because,

(a) Even if there were no stream of interstate commerce, R. & T. §225 would still present to the world a non-uniform tariff schedule (U.S. Const. Art. I, §8, Cl. 1); would prevent the Nation from speaking with one voice regarding tariff protection (Board of Trustees v. U.S., supra); and would discourage interstate manufacturers from even starting an interstate stream of commerce (H. P. Hood & Sons v. DuMond, supra, at p. 535).

14/ (continued from previous page)

and the case upon which it relies, i.e. Society for Savings, etc. v. Bowers, 349 U.S. 143 (1955). But in those cases, the taxpayer claimed federal immunity as an arm of the Federal Government pursuant to a Federal statute. Here (and in American Oil and Gurley), the Petitioner makes no such claim.

(b) The Court of Appeal found that there is a substantial stream of interstate commerce. The Petitioner should not be able to alter its position so as to embarrass that finding. 14a/

(c) The Commerce Clause "protects out-of-state businesses from any discriminatory burden on their interstate commerce activities," even an "inhibition" (Boston Stock Exchange v. State Tax Comm., supra, at p. 334, fn. 13).

14a/ The Court of Appeal also ruled that (1) the Respondents had standing to raise constitutional issues (2) the exemption could not be expanded to make it constitutional. Both of those holdings are supported by independent state grounds (see Respondents' Response to Pet. for Hearing before the California Supreme Court) and were not raised before this Court.

7. The Petitioner Cannot Avoid Boston Stock Exchange, Board of Trustees and Buttfield v. Stranahan By Contending That a Federal Statute Or a Constitutional Immunity From Taxation Is Consistent With R. & T. §225.

The Petitioner and the Solicitor General make three related arguments:

(a) Without once referring to Federal tariffs on goods, the Petitioner and Solicitor General's Office refer to Federal statutes exempting air flights coming from or going to foreign countries (Pet. Brief pp. 8 and 18; Solicitor General's Brief pp. 13-14).

But the exercise of its power to regulate foreign commerce cannot make the Federal power over foreign commerce less exclusive (see concerning opinion by Justice Stewart in Zchernig v. Miller, supra, at p. 433).

In any case, the Federal statutes do not apply to taxes on goods. Tariffs do. Finally, R. & T. §225 is not consistent with these statutes. The Federal statutes exempt all flights coming into the United States from abroad, even if they stop and unload in California. R. & T. §225 creates a preference only if the foreign goods move on.

(b) The Petitioner and the Solicitor General argue that Japan Line Ltd. v. County established

a foreign preference for foreign international carriers, and, therefore, any state may enact preferences for foreign goods.

Even if Japan Line Ltd v. County, supra (which provides a conditional immunity), is the harbinger of a total immunity for everything foreign (as Amicus Star-Kist suggests), it does not follow that the States may enact 50 different degrees of foreign preferences. Nor does it mean that the States can distinguish between foreign manufacturers on the basis of where they sell their goods.

(c) Finally, the Petitioner and the Solicitor General contend that R. & T. §225 (and 49 similar regulations) allow the Nation to speak with one voice in conducting foreign affairs. They then assume that compliance with the import-export clause validates R. & T. §225 under the commerce clause.

The second assumption is obviously incorrect.

The argument that R. & T. §225 allows the Nation to speak with one voice is valid if one ignores every single protective tariff; every single Presidential proclamation raising tariffs to protect domestic industry; and the decisions in Board of Trustees v. U.S., supra, and Buttfield v. Strahanan, supra. But these indications of protective purposes and Federal exclusivity will not go away.

8. Petitioner Cannot Make Import Regulation Less Exclusively Federal By Its De Minimus Argument. In Any Case, R. & T. §225 Has the Effect Of Decreasing Certain Tariff Schedules By 50% Or More.

The Petitioner ignores the impact of such regulations being enacted by several states and contends that a 1/2% difference between foreign and domestic goods is not large enough to consider. (The difference can be as high as 1 3/4%) (see Pet. Brief p. 23).

But, in Boston Stock Exchange v. State Tax Comm., supra, this Court considered a tax difference amounting to .19% as significant (429 U.S. at p. 334). As pointed out in connection with Petitioner's "fact" argument, Boston Stock Exchange also holds that even without direct monetary payments, out-of-state manufacturers are protected from the inhibiting effects of discriminatory regulations (429 U.S. at p. 334, fn. 13).

Further, Congress has enacted tariff levels in the range of 0 - 3% ad valorem. (See Appendix C.) Compared with a duty of 1%, the 1/2% difference created by R. & T. §225 is substantial.

Finally, the Executive Branch has altered tariffs in amounts of 1/2%, even when a 2% change was requested (see Appendix E herein).

9. The Application Of Boston Stock Exch., Buttfield v. Strahanan and Board of Trustees Is Further Supported By Other Holdings By This Court.

Certain state acts are prohibited under the commerce clause. The following prohibitions apply here:

(a) R. & T. §225 acts on goods only temporarily in the state so as to impose pricing preferences in other states. Projecting pricing regulations is prohibited (Baldwin v. Seelig, 294 U.S. 511, 521 (1935); Rottschaeffer, Handbook of American Constitutional Law, pp. 320 and 322, 1939).

(b) R. & T. §225 discriminatorily restricts the re-entry of interstate goods (and "manufactured" foreign goods) into interstate commerce. Such restrictions are prohibited (H. P. Hood & Sons v. DuMond, supra, at p. 539).

(c) R. & T. §225 effectively creates a selective tariff by discriminating between foreign goods. Tariffs must be uniform (Art. I, §8, Cl. 1).

10. R. & T. §225 Is Not Valid Because It Attempted to Comport With the Original Package Doctrine As Interpreted Before 1976.

R. & T. §225 was drafted in response to the problems of a particular interest group. 15/ It may have attempted to correspond to the then existing interpretation of the original package doctrine, but failed (see Solicitor General's Brief p. 10, fn. 5).

The Petitioner relies on First Federal S. & L. Assoc. v. State Tax Comm., 437 U.S. 255 (1978), for the proposition that the California Legislature's intent will validate R. & T. §225. First Federal S. & L. v. State Tax Comm., supra, does not stand for any such proposition. In fact, other holdings by this Court indicate that a state regulation must be reviewed under the circumstances prevailing at the time of the review. Georgia v. Rachel, 384 U.S. 780, 785 (1966). This is logical. To allow a state regulation to stand even though clearly invalid under the present state of the law, would undermine every single ruling of this Court and every single Federal statute.

15/ Contrary to the Petitioner's description of the history of the statute, that group's concerns were already aleviated (see R. & T. §233 and Respondents' Response to Petition for Writ of Certiorari p. 3).

The Supremacy Clause makes the constitution, as interpreted by this Court, the supreme law of the land. There is no authority for saying that this rule stops as of 1975.

The Court of Appeal attempted to stop the operation of this statute at the state level. The Legislature repealed it by implication (and is considering refunding these taxes). Using the "ghost" of R. & T. §225 to allow the States to countervail Federal policy regarding foreign commerce is not supportable.

III
THE VARIOUS FEDERAL ACTS SETTING AND REVISING TARIFF LEVELS PRECLUDES STATE ACTION IN THE SAME AREA.

A. The Tariff Acts Show the Necessity For Exclusive Congressional Authority In the Field Of Import Regulation.

There is no doubt that with some exceptions (Japan Lines Ltd. v. County, supra), the States have the authority to regulate the movement of imported goods and to tax them alike with domestic products. But when the State regulates between foreign and interstate goods, because they are either foreign or interstate, such State action is not valid.

As this same Solicitor General said only one year ago:

> "This Court has held that a state tax or regulation that disadvantages interstate or foreign commerce simply because it is interstate or foreign commerce interferes with the exclusive national authority to regulate such commerce. . . ." (See Solicitor General's Brief in Japan Lines Ltd. v. County, supra, at p. 19.)

There is good reason to accept the Solicitor General's statements in this matter. As already pointed out, the treatment of foreign goods vis-a-vis domestic goods is part of our foreign policy (see Board of Trustees v. U.S., supra, at p. 58). It is an extremely sensitive field and requires a determination of the precise extent that domestic goods are to be favored over foreign goods.

Not only should Congress be the exclusive regulator of this sensitive subject, but it has filled the subject to overflowing with a whole panolply of regulations. Specifically, it has imposed, and is constantly tinkering with, a whole set of ad valorem preferences for domestic goods imposed by means of customs duties.

Both the need for exclusivity and the pre-emption of all similar State activity is demonstrated by this Federal activity.

B. Both the Tariff Acts and the Rulings Of This Court Show the Extent Of Federal Activity Creating a Balance Between U.S. and Foreign Goods For a Host Of Purposes.

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1. The Basic Thrust Of Many Of the Tariff Provisions Is to Protect Domestic Industry From Foreign Goods By Equalizing Costs.

Title 19 U.S.C. §§1303 and 1336 protect domestic goods from foreign competition selling at reduced prices. This particular type of protection is probably the basis for most of the tariff schedules (19 U.S.C. §1202).

Of course, the Tariff Act of 1930 specifically announces its intent to act as a protector of domestic industry:

> "CHAP 497. - An Act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, to protect American Labor, and for other purposes." (46 Stats. C. 497.)

2. The Anti-Dumping Provisions Of Title 19 U.S.C. and the "Trigger Price Mechanism" Provide Further Protection to Domestic Industry By Investigations Of Sales Below Certain Prices.

Title 19 U.S.C. §§160, et seq. protects domestic products from competition by foreign producers selling (or likely to sell) at a price less than at "fair value."

The "trigger price mechanism" (described at 42 F.R. 65214) creates a special set of prices for steel products. If foreign steel is sold for less than those prices, a hearing by the Treasury Department is automatically "triggered." The purpose of the hearing is to determine whether "dumping" has taken place.

3. The President Is Empowered to Raise Tariffs In Order to Countervail Discrimination By Other Foreign Countries Against American Exports.

Title 19 U.S.C. §1338 describes various situations calling for Presidential action in order to deal with various discriminatory acts of other countries. Those discriminatory acts range from discrimination directly against U.S. goods to the

conferring of benefits on third countries. 16/

Using tariffs to counteract various regulations of foreign countries is explicitly countenanced by this Court in Board of Trustees v. U.S., supra, at p. 58 (see quote, supra). In addition, ". . . Congress may and undoubtedly does, in its tariff legislation consider the conditions of foreign trade in all its aspects and effects."

4. In Addition, Congress Has Authorized the President to Protect American Industry By the Imposition Of Additional Tariffs (the Trade Act of 1974).

The President has by proclamation increased tariffs in order to protect domestic industry. These tariffs do not equalize costs. They counteract the threat to domestic manufacturers. (See Appendix D.)

These actions, their protective purpose, and the qualifying circumstances are all set forth at 19 U.S.C. §2253 (also see 19 U.S.C. §1351(a)).

16/ It is interesting to note that in applying these rules, Congress refers to commercial regulations imposed by a foreign country, including its subdivisions (19 U.S.C. §1338(i)).

C. Revenue and Taxation Code §225 Invades This Exclusive Area Of the Federal Government, and Is Excluded By the Complete Scheme Of Federal Regulation.

1. R. & T. §225 Acts as an Exception to the Federal Government's "System" Of Protection.

Contrasted with all of these protective purposes, R. & T. §225, deducts from the present tariff rates a variable amount up to 1-3/4% (in this case averaging 1/2%) (see Pet. Brief p. 23. The variation has nothing to do with national policy, but only to do with the "turnover" rate at the California warehouse.

The Federal Government protects domestic industry and labor by low tariff rates as well as higher ones. Many of the foreign goods are subjected to 1% rates (see Appendix C). Appendix E shows that the Federal Government is interested in ad valorem amounts of 1/2%.

But R. & T. §225 would cut across those differences variably. Sustaining this statute would allow all 50 states to enact similar legislation.

The Federal Government, as long ago as 1928, had created a system of protecting domestic industry. In J. W. Hampton & Co. v. U.S., 276 U.S. 394, this Court approved that purpose. It also said,

"The enactment and enforcement of a number of customs revenue laws drawn with a motive of maintaining a system of protection since the revenue law of 1789 are matters of history."
(276 U.S. at p. 411.)

The basis for such a protection system is UNIFORMITY. That uniformity is required by U.S. Const. Art. I, §8, Cl. 1, and is carried out by the Treasury Department pursuant to 19 U.S.C. §1502(a).

But R. & T. §225 is not protective, it is not uniform, and it selectively (out of state destinations vs. in-state destination) and variably (depending upon time in the state) favors foreign goods over interstate goods. 17/

2. The Federal Scheme Is So Pervasive That There Is a Reasonable Inference That Congress Intended Tariff Regulations to Be Exclusive.

R. & T. §225 is precluded by the "protective system" for a host of reasons. The general rules

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17/ The Federal system involving exports is not quite so apparent because no American government can tax exports as such (U.S. Const. Art. I, §9, Cl. 5). In fact R. & T. §225, by choosing between exports, has this effect.

applicable to this set of circumstances are set forth in Ray v. Atlantic Richfield Company, 435 U.S. 151 (1978). The first rule is that the state regulation is invalid if the Federal scheme is pervasive.

The tariff statutes and regulations, and the decisions of this Court concerning tariffs, demonstrate the exclusivity of the tariff regulations. This Court has so held in Board of Trustees v. U.S., supra, at pp. 56-57; Buttfield v. Stranahan, supra, at p. 492; and Brolan v. U.S., supra, at p. 218.

Congress' power to regulate foreign commerce by differentiating between imports and domestic goods has been used to its full extent and embodies a total system. The States may not interfere.

3. Distinguishing Between Foreign and Domestic Goods Is a Field In Which the Federal Interest Is So Dominant That State Regulations On the Same Subject Are Assumed to Be Precluded.

The second test, the application of which invalidates R. & T. §225, is the nature of the Federal interest. As already pointed out, this Court and the Solicitor General have repeatedly pointed to foreign affairs as an extremely sensitive subject requiring Federal control (see e.g. Hines v. Davidowitz, supra).

R. & T. §225 exempts some foreign goods, but not all. Its effects, in relationship to domestic goods, are VARIABLE, depending upon the amount of time the goods stay in the jurisdiction. It also discriminates against foreign producers operating in this country (because their goods are interstate, not foreign).

To allow all 50 States to enact legislation regulating imports would effectively take control of this sensitive area out of Federal hands. This area must not be placed in chaos as the Petitioner suggests.

4. The Objects and Obligations Of the Tariffs Acts Reveal a Purpose to Be Exclusive.

As this Court said in Board of Trustees v. U.S., supra, tariffs are an embodiment of Congress' view as to the extent of regulation between domestic and foreign goods. The object is to apply the precise amount of such regulation and no more. The object is accomplished by an ad valorem duty.

The object of tariff regulations and the manner in which they are achieved demonstrates the exclusivity of Federal control. It is no wonder that this Court has said that the Federal power in this field is "plenary" (Buttfield v. Strenahan, supra, and Brolan v. U.S., supra).

Thus, the objects and obligations of the Tariff Acts reveal an exclusive scheme.

5. R. & T. §225 Stands As an Obstacle to the Accomplishment Of the Full Purposes Of the Congressional Objective.

The final test described in Ray v. ARCO is that the state regulation will be declared invalid if it stands as an obstacle to the accomplishment of the purpose of the Federal regulation.

The Federal Government protects American industry by setting up tariff regulations in precise amounts. But R. & T. §225 changes that level of protection.

The Federal Government encourages a foreign producer to enter the American market, but only to a limited extent. R. & T. §225 provides more encouragement.

The Federal Government protects American producers so that they can successfully compete in interstate commerce. R. & T. §225 reduces this protection and discourages the American producer from participating in interstate commerce.

Even before shipment takes place these producers must consider the effects of R. & T. §225 and similar statutes on them. Foreign producers must consider the effect of selling to California customers, or of having their goods

painted before being sent to out-of-state customers. American producers must consider the added cost of avoiding the state tax which is not imposed on their foreign competitors.

In 1832 South Carolina enacted an "Ordinance of Nullification," which purported to nullify Federal tariff statutes insofar as they applied in the state (see The Federalist, Paul Leicester Ford, Editor, 1898, pp. 690-692). (The ordinance was, apparently, never enforced by the state.)

Now the Petitioner seeks to validate a statute which partially nullifies protective tariffs. R. & T. §225 is no more constitutional than the South Carolina ordinance.

As this Court recently said,

> "California, by its unilateral act, cannot be permitted to place these impediments before this Nation's conduct of its foreign relations and its foreign trade." (Japan Line Ltd. v. County, supra, slip opin. at p. 19.)

Despite the new position of the Solicitor General, R. & T. §225 cuts into the exclusive Federal power to regulate commerce. R. & T. §225 is in direct conflict with protective tariffs. It destroys Federal uniformity in an area where uniformity is both important and constitutionally required.

It is respectfully submitted that none of the arguments presented by the Petitioner or the

Solicitor General allows the States to impose their own views of foreign and interstate commerce on goods temporarily within their borders. To allow all of the States to impose such regulations would effectively end Federal control of import regulations. State exemptions which are not uniform, which are variable, and which carry out only a State's perception of foreign commerce go too far. They invite chaos in our dealings with foreign nations.

Respectfully submitted,

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APPENDIX A

225. **Personalty in transit.** Personal property manufactured or produced, (1) outside this state and brought into this state for transshipment out of the United States, or (2) outside of the United States and brought into this state for transshipment out of this state, for sale in the ordinary course of trade or business shall be exempt from taxation. The exemption under this section shall not apply to personal property in manufacturing process or production. Such process or production shall not include the breaking in bulk, labeling, packaging, relabeling, or repackaging of such property.

History.—Added by Stats. 1975, Ch. 1128, p. 2746, in effect January 1, 1976. Sec. 4 thereof provided no payment by state to local governments because of this act.

APPENDIX B

EXCERPTS FROM "CONDITIONS OF COMPETITION IN THE WESTERN U.S. STEEL MARKET BETWEEN CERTAIN DOMESTIC AND FOREIGN STEEL PRODUCTS" U.S. INT'L TRADE COMM PUB #1004 SEPTEMBER 1979

123

Foreign Investment in Western States 1/

Foreign investment in steel-related producing, fabricating, importing, distributing, and consuming firms in the Western States is small but growing. A total of 200 firms, accounting

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1/ "Ownership" or "control" for purposes of this discussion means ownership of 50 percent of more of the outstanding voting stock. However, it must be noted that in many cases the owner of substantially less than 50 percent of the shares of a corporation may have effective control of the corporation. As a general rule, the more widely held a stock is the lower the percentage of shares required for control. In this regard, it should also be noted that the U.S. Department of Commerce considers a business enterprise to be foreign controlled where 25 percent or more of the voting shares are beneficially foreign held. Only one of the firms responding affirmatively to the question of foreign investment indicated that the level of foreign investment in the firm was less than 50 percent.

firms, accounting for about $28 billion in sales, responded to the Commission's investment questionnaire. As of January 1, 1978, 28 of these firms were owned by foreign firms or affiliates of foreign firms, while another 3, although U.S.-owned, can be considered to be controlled by foreign interests owing to their financial obligations to such foreign firms. 2/

Investment by Japanese-affiliated firms in the Western marketing region is, by far, the most prevalent.

* * *

In 1976 these firms had sales of 2 percent of total sales of firms responding to the questionnaire.

Canada is the only other country having substantial investments in Western States steel-related firms. In 1976, six firms with Canadian interests had sales of 2 percent of total sales of firms reporting to the Commission. Countries other than Japan and Canada having investments in the Western States are primarily the United Kingdom, Taiwan, Italy, and Korea.

2/ This control by lenders encompassed formal agreements restricting management activity in such areas as payment of dividends, maintenance of minimum net worth, disposition and assignment of proceeds from accounts receivable, limitation on new debt obligations, and acquisition of additional steel for inventory.

The time frame in which foreign investments in Western States steel-related firms have occurred is shown in the following tabulation:

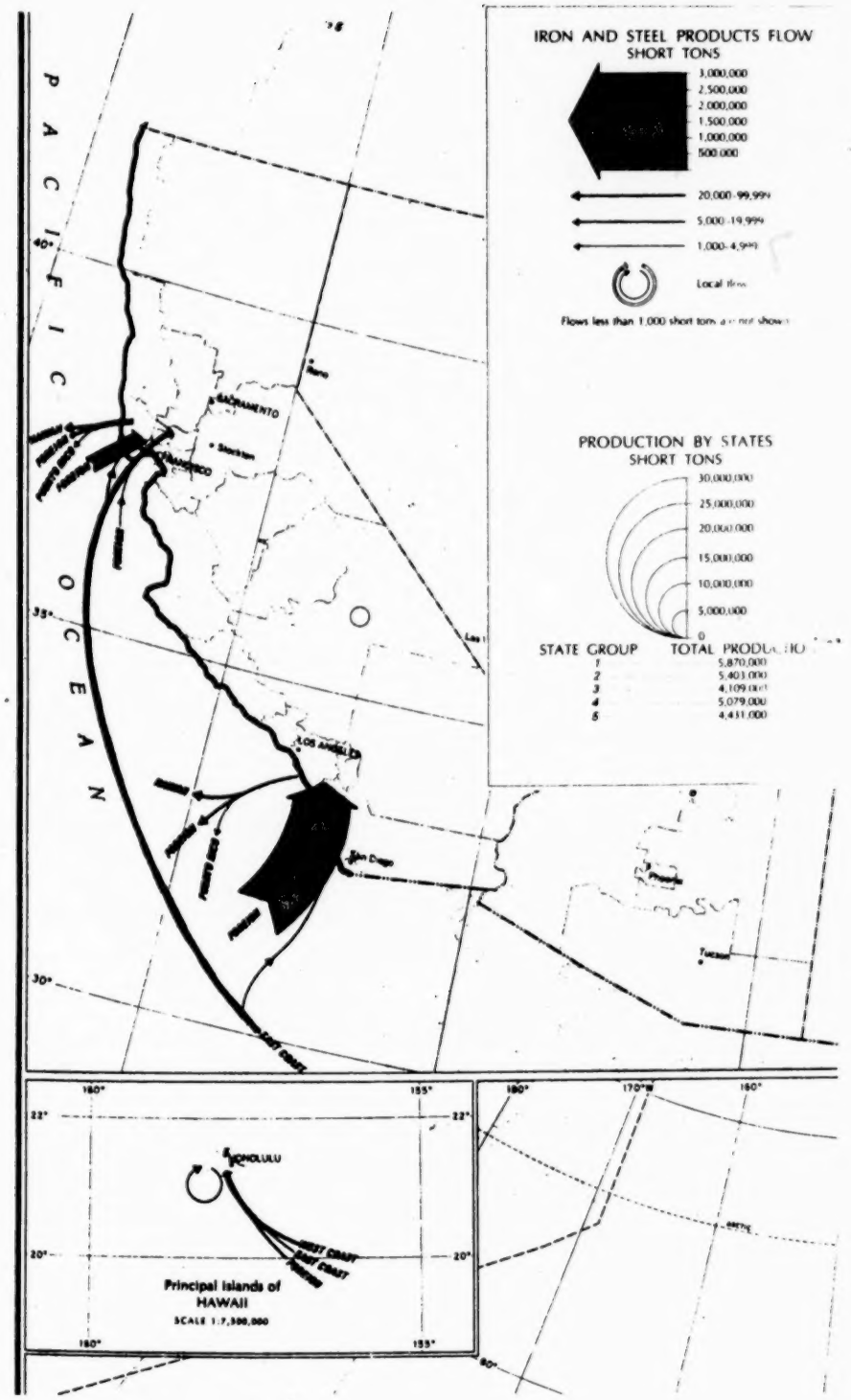
Country	1972 and before	1973-75	1976-77	Total
Japan	5	5	5	15
Canada	3	1	2	6
Other	5	2	3	10
Total	13	8	10	31

These data indicate that foreign investment is occurring at an accelerated rate--two-thirds of the firms in which Japan has interests were acquired in the past 5 years, and one-half of the firms in which Canada and other countries have interests were acquired during this same period.

On the basis of field research and trade sources, it appears that the reasons foreign investment has occurred in the Western States depend upon the steel sector involved and the time frame in which the foreign investment was made. In the distribution sector of the market, the acquired firms were generally importers dependent primarily upon Japanese sources for steel supplies. Foreign investments were directly linked to excess inventories of high-priced foreign steel purchased during the steel shortage of 1973 and early 1974. The weakness of demand and depressed prices in 1975 caused cash flow problems among domestic firms, which led to difficulties in their meeting accounts-payable obligations to foreign suppliers. In all cases, foreign investment in the distribution sector during 1975 was made by the foreign

supplier of a financially weak debtor.

In contrast to that in the distribution sector, foreign investment in the producing and consuming markets has resulted from the desire of U.S. firms to secure a broader capital base from which to expand an already successful business. Generally, these investments were in response to initiatives made by U.S. firms after their attempts to obtain participation by other U.S. firms had failed.



APPENDIX C

EXCERPTS FROM 19 USC § 1202

Advanced Aconite, etc.
(Item 435.10) .....1.5% ad val

Advanced Natural Drugs
(Item 439.30) .....1.5% ad val

Agricultural hand tools of cast-iron hatters' irons (Item 651.45...1.5% ad val

Animal substances, crude
(Item 191,15) .....2.5% ad val

Architectural sand plans used as designs for floor coverings, etc (Item 273.50) .....1.5% ad val

Artificial Graphite
(Item 517.11) .....2.5% ad val

Boxwood, Japanese maple and Japanese white oak
(Item 202.38) .....1.0% ad val

Cast iron pipe and tube fittings (Item 610.65) .....3.0% ad val

Cast malleable iron boot or shoe plates (Item 652.06).....2.5% ad val

Cements, not specially provided for (Item 494.60) .....2.5% ad val

Confectioners' coatings
(Item 156.47) .....2.5% ad val

Coral and cameos (jewelry)
(Item 741.15) .....2.5% ad val

Coarse-grained earthenware or stoneware chiefly used for preparing, serving, or storing food
(Item 533.11) .....2.5% ad val

Crystalline Graphite lump
(Item 517.27) .....2.5% ad val

Edible meat offal valued over 20 cents per pound
(Item 106.85) .....2.5% ad val

Fish roe boiled and in airtight containers (Item 113.35) .....2.5% ad val

Frogs (Item 106.60) .....2.5% ad val

Frozen Blueberries
(Item 146.68) .....3.0% ad val

Hydroids, treated and dyed for ornamental use (Item 190.57) .....2.5% ad val

Ink powers (Item 474.20) .....2.0% ad val

Laminated Paperboard
(Item 251.45) .....2.5% ad val

Mattress Hair (Item 186.40) .....2.0% ad val

Mica untrimmed phlogopite
(Item 516.11) .....2.5% ad val

Millstones of natural corundum (Item 519.95) .....2.5% ad val

Natural Hormones not artificially mixed
(Item 437.58) .....2.0% ad val

Natural Vitamins not artificially mixed (Item 437.84) .....2.0% ad val

Other Bovine (Item 120.17) .....2.0% ad val

Other Inks (Item 474.26) ..... 2.0% ad val

Other Wheat (Item 131.75) .....2.5% ad val

Other Willow (Item 222.25) .....2.5% ad val

Photography Papers (Item 252.05) .....1.0% ad val

Piles not cold worked (Item 620.40) .....3.0% ad val

Plain Softwood (Item 200.91).....2.5% ad val

Printed catalogs (Item 270.45).....1.5% ad val

Printed matter susceptible of authorship (Item 274.85) .....2.0% ad val

Slabs not rubbed and not polished in whole or in part (Item 514.61)...2.5% ad val

Standard Pine moldings (Item 202.62) .....1.5% ad val

Wild rice, crude or processed (Item 182.70) ..... 2.5% ad val

X-ray apparatus, other (Item 709.63) .....2.5% ad val

Yachts valued not over $15,000 (Item 696.05) .....2.0% ad val

APPENDIX D

SELECTED PRESIDENTIAL PROCLAMATIONS AND TARIFF SCHEDULES FROM 1974 to 1978

1. Ad valorem increases by the President to protect domestic industry:

   a. No. 4279 of April 1, 1974, 39 F.R. 11861 (Pres. Nixon) for Ball Bearings with rates varying from 11 to 20% ad val.

   b. No. 4436 of April 30, 1976, 41 F.R. 18397 (Pres. Ford) for Ceramic tableware with rates varying from 14 to 55% ad val.

   c. No. 4510 of June 22, 1977, 42 F.R. 32430 (Pres. Carter) for certain Footwear with rates varying from 6 to 86% ad val.

   d. No. 4538 of Nov. 11, 1977, 42 F.R. 59037 (Pres. Carter) for Sugar with a rate of 50% ad val.

   e. No. 4547 of Jan. 20, 1978, 43 F.R. 3251 (Pres. Carter) for Sugar with a rate of 50% ad val. limitation.

   f. No. 4561 of April 7, 1978, 43 F.R. 15127 (Pres. Carter) for Citizens Band (CB) Radio Transceivers with rates varying from 6 to 35% ad val.

g. No. 4608 of Nov. 15, 1978, 43 F.R. 53701 (Pres. Carter) for High-Carbon Ferrochromium with increases on the column 1 rate of 30% ad valorem in the first year declining to 20% ad valorem in the fifth year of relief.

h. No. 4631 of Dec. 28, 1978, 44 F.R. 1 (Pres. Carter) for Sugar with a rate of 50% ad val. limitation.

APPENDIX E

Ad Valorem Tariff on Lead To Be Cut From 4% to 3.5%

WASHINGTON — Special Trade Representative Reubin Askew has agreed to reduce to 3.5 percent the 4 percent ad valorem tariff on the lead due to take effect Jan. 1, following negotiations with the Lead-Zinc Producers Committee and United States lead consumers.

But the reduction is not as severe as the 2 percent cut that a coalition of domestic consumers had sought (AMM, Nov. 9).

A source in the trade representative's office said the decision to reduce the tariff has been made, although final document on the lowered tariff has not been signed yet. He noted that the consumers were probably still displeased with the 3.5 percent tariff.

Max Turnipseed, manager of international trade affairs for Ethyl Corp., spearheaded the consumer group, which included ESB Ray-O-Vac Corp., Philadelphia; Hammond Lead Products, Hammond, Ind.; Globe-Union Inc., Milwaukee; Gould Inc., Rolling Meadows, Ill., and Prestolite Co., Toledo.

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